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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: WAC 00 142 52705

Office: CALIFORNIA SERVICE CENTER

Date: FEB 06 2003

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

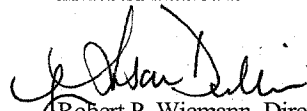
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The decision of the director will be withdrawn and the petition remanded for further action and consideration.

The petitioner is engaged in the manufacturer of silicon wafers. The petitioner seeks to employ the beneficiary in the United States as its vice general manager. Accordingly, it seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that although the beneficiary supervised four positions that were managers, supervisors, or professional positions for the foreign entity for one year prior to entry into the United States, the beneficiary also supervised two positions that were not managerial, supervisory, or professional in nature. The director concluded that the beneficiary was ineligible for classification as a multinational executive or manager.

On appeal, counsel for the petitioner asserts the decision was in error and without merit.

Section 203(b) of the Act states, in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers.
-- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which

demonstrates that:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

The issue in this proceeding is whether the petitioner established that the beneficiary had worked in a managerial or executive capacity for the claimed foreign entity for at least one year in the three years immediately preceding the beneficiary's entering into the United States.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially provided a broad description of the beneficiary's duties as director of administration for the claimed foreign entity. The director requested that the petitioner provide a more detailed description of the beneficiary's duties abroad and to also provide an organizational chart for the claimed foreign entity.

In response, the petitioner provided an organizational chart that depicted six employees under the beneficiary's supervision. The chart outlined the duties of the six positions and provided the salaries and the educational level of the individuals holding the

positions. The petitioner also provided an additional description of the beneficiary's duties albeit a general one.

As noted above, the director concluded from the information provided that the beneficiary's supervision of two non-managerial, non-supervisory, non-professional employees made the beneficiary ineligible for this visa classification.

On appeal, counsel for the petitioner cites two unpublished decisions and asserts that it is not reasonable for the Service to deny the petition solely because two non-managerial employees were under the beneficiary's position.

Upon review of the record, we agree that the director provided an inadequate explanation of the evidence reviewed and apparently based the decision on only a portion of the evidence in the record. We also note, however, that citations to unpublished decisions are without merit. Unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c). We further note that the overly broad description of the beneficiary's duties for the foreign corporation is not sufficient to sustain this appeal. In examining the executive or managerial capacity of the beneficiary, the service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). In the instant case, the description provided paraphrases elements of the statutory definition of managerial capacity without detailing the beneficiary's daily activities. Although the beneficiary may manage supervisory or managerial employees, the petitioner did not specify the amount of time spent on this duty. It is not possible to determine from the information provided that the beneficiary was primarily employed as a manager as defined by the statute in his position as vice general manager for the claimed foreign entity.

Because the director's decision was deficient in that it failed to examine the entirety of the evidence submitted on this issue, the matter will be remanded for the purpose of a new decision.

However, review of the record reveals additional issues that must be addressed by the director before a decision is entered. It is noted that the director did not address the issue of the work to be performed by the beneficiary for the petitioner and whether the evidence provided established that the beneficiary would be employed in a primarily executive or managerial capacity.

Furthermore, the record presents confusing evidence regarding the ownership and control of the petitioner. The petitioner has provided complex documents and charts to show the myriad number of transactions made between various companies and then asserts that ultimately the foreign entity, Wafer Work Corporation, is the petitioner's parent company. The petitioner also states that Wafer Work Corporation set up a holding company, Silicon Technology Investment Corp. to hold 100 percent of the

petitioner's common shares as its United States subsidiary. However, the documentation provided does not reveal the final transactions that would result in an affiliate or subsidiary relationship between the claimed foreign entity and the petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

These additional issues must be thoroughly examined by the director before entering a new decision.

Accordingly, this matter will be remanded for the purpose of a new decision. The director must afford the petitioner reasonable time to provide evidence that is pertinent to the above issues, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility.

ORDER: The director's decision of February 5, 2001 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.